VIRGINIA LAW REGISTER.

EDITED BY W. M. LILE.

Issued Monthly at $5 per Annum. Single Numbers, 50 Cents.

Communications with reference to CONTENTS should be addressed to the EDITOR at University Station, Charlottesville, Va.; BUSINESS communications to the PUBLISHERS.

WITH this number we close our Vth volume. The accompanying volume index was prepared by H. A. Minor, Jr., of the Lynchburg bar.

OUR readers will doubtless be interested in the portraits of the Judges of the Supreme Court of Appeals of Virginia, presented as a frontispiece with this number. We doubt if any State of the Union can make a finer show of judicial faces.

WE are in receipt of the prospectus of a new law journal, to be published at Raleigh, North Carolina, under the editorship of Paul Jones, Esq., of Tarboro, in the same State. The journal is to be known as the *North Carolina Law Journal*, and the first number is promised during the month of April.

Up to this time we believe that Virginia and West Virginia are the only Southern States in which law journals are published. We are glad to see our North Carolina brethren moving in that direction. The REGISTER will extend a cordial welcome to its new neighbor.

We learn that a similar publication is projected in Georgia, to be published in Atlanta. A law journal in every State of the Union would work a great advance in our system of jurisprudence.

THE *Bombay Law Reporter* has enlarged its scope and plan, by adding editorial and other matter to its reports of cases. We have found the latter chiefly valuable for the athletic exercise derived from an endeavor to pronounce the names of the parties. For instance *Khandubhai Gulabbhai* v. *Pirbhai Khakhibhai*, in which Mr. *Daji Abaji Khare* appeard for the appellant and Mr. *Manekshah Jehangirshah* and Messrs. *Daftari* and *Ferreira*, for the respondents. In *Jethabhai Veharidas* v. *Gordhan Kirpashankar*, we find a familiar

principle laid down that a "a right to pass filthy and other water on the land of another can be acquired by immemorial user."

The February number before us contains much interesting matter—including many notices of American cases.

By a joint resolution of the two houses, the legislature of Virginia, at its recent session, requested the State Board of Health and Vital Statistics to report to the next session of the legislature "whether or not, in their opinion, some mode of inflicting the death penalty, more humane and approved by science, than the mode by hanging, is practicable, and also as to the advisability of having all such executions performed at some particular place in the State, to be selected for that purpose" (Acts 1899–1900, p. 513).

It is therefore within the bounds of probability that Virginia may follow the lead of New York in executing criminals by electrocution. The New York method seems to have given entire satisfaction to humanitarians and scientists. How the electrocuted like it is not recorded.

Elsewhere will be found a synopsis of some of the more important statutes passed at the recent session of the Virginia legislature. The list is not exhaustive, since the volume of Acts is yet unpublished, and we have been able to examine only such advance sheets as had been issued up to the time the synopsis was prepared; and of those examined we have selected only such as seem to be of special interest to the bar

There was at this session, radical legislation affecting the married woman and her estate, and we had hoped to be able to publish this in full, with comments, in this number, but were not able to procure copies in time. We hope to do this in our May number. From our examination of some of the acts on this subject, the married woman seems to have been completely emancipated, so far as concerns her property rights and powers of contract. After *Hirth* v. *Hirth*, however, we guess with caution.

We commend to our readers a careful perusal of the paper by Mr. Pettit, published as the leading article in this number. The paper is a criticism of the recent decision of the Virginia Court of Appeals in *Patterson* v. *Crawford*, the opinion in which case was published in full in our January number—5 Va. Law Reg. 611.

Mr. Pettit's point is that the court's reasoning does not accord with

its decision; that, while declaring the principle that the debtor cannot be held responsible for the receiver's default, resulting in a loss of the funds into which the debtor's property had been converted, and the latter be made to pay his debts twice, the practical effect of the decision is, in fact, to throw the burden of the loss on the debtor.

The argument is briefly this: If there had been no other creditors than the five preferred lienors, and the funds in the receiver's hands, sufficient to pay all these liens, had been lost by the receiver's default, these debts must have been regarded as paid; and, although there were enough property still remaining in the debtor to pay such debts, these creditors could not have had recourse against it, because this would in effect have required the debtor to pay twice. The fact that this remaining property was encumbered with other debts—due to other creditors than the five mentioned—could, on principle, make no difference in the result. Yet, by the decision of the court, these five preferred creditors *are* let in on other property of the debtor, and the inferior creditors are displaced for that purpose, with the apparent right on the part of the latter to still look to the debtor for payment—whereas, if there had been no such inferior creditors, the debts of the superior creditors would have perished with the loss of the funds in the receiver's hands. This reasoning is difficult to answer.

In *Stuart* v. *Pennis*, 91 Va. 688, it was held, by a unanimous court, that a contract in writing for the sale of growing trees is specifically enforceable. The lower court had held otherwise on a demurrer to the bill, but on appeal this decision was reversed, and the demurrer overruled. The correctness of the ruling on the demurrer was the only point involved in the appeal. Judge Riely, who delivered the opinion, quoted the contract in full and entered into a full discussion of the question. While conceding that the authorities are conflicting, the court reached the conclusion that on reason, and by the weight of authority, such a contract is in substance a contract relating to realty, and is therefore specifically enforceable.

Subsequently the case came before the court again, apparently on precisely the same point. On this second appeal the court apparently overrules its former decision, without assigning any reasons, and without distinctly repudiating the former decision. Judge Riely did not take part in the decision. The conclusion is announced in the following memorandum by Cardwell, J:

"In this case, which is a sequel of the case of *Stuart* v. *Pennis*, 91

Va. 688, the court being equally divided as to the right of the appellant to have a decree for the specific performance of the contract in his bill mentioned, no opinion has been prepared, but it appearing to the court that the decree dismissing the bill should have been without prejudice to the right of appellant to bring his action at law upon said contract, if he be so advised, the decree appealed from will be amended in this respect, and as amended will be affirmed with costs to appellee." (33 S. E. 1015.)

It will be observed that the point decided on the latter appeal was, that while the plaintiff might have a remedy *at law* on the contract, there was none in *equity*. No reference is made to the opposite conclusion on the former appeal, and it is not clear whether the former ruling was intended to be reversed or not. When these two decisions are put side by side, the law of the subject in Virginia is left in rather an unsatisfactory condition.

WE are indebted to a learned but modest correspondent, who prefers not to be mentioned by name, for calling our attention to the fact that the views expressed in the editorial note to *Rowe* v. *Hardy*, 5 Va. Law Reg. 672, with respect to keeping judgments perpetually alive by issuing execution, under Va. Code, sec. 3577, have not been uniformly accepted. He calls attention to two articles by Mr. Samuel D. Davies, of the Richmond bar, published in 15 Virginia Law Journal, pp. 273 and 377, in which these views are controverted, and papers in the same volume (pp. 341 and 445) by C. E. Nicol (now Judge Nicol), of Manassas, maintaining the views expressed by the REGISTER; and also to an unreported decision by the circuit court of the Sixth judicial circuit, adverse to these views.

We are indebted to the same source for a reference to 2 Barton's Law Practice, 790 (note), where this learned author expresses the opinion that a judgment may be "perpetually revived if execution is continually renewed, or *scire facias* or action be brought in due time."

We agree with our correspondent that the report of the revisors of the Code of 1849, seems to settle the question in favor of the views we have expressed. Referring to section 11 of ch. 186, Code of 1849 (now embodied in sec. 3577 of the Code of 1887), and to that portion of the section which provides that "where execution issues within the year, other executions may be issued . . . . within ten years from the return day of an execution on which there is no return by an

officer, or within twenty years from the return day of an execution on which there is such return," the revisors say:

"There is now no limitation in such case. Although a return of 'no effects' tends to repel a presumption of payment, it is deemed not unreasonable that a creditor *who wishes to preserve his execution in force after twenty years, should take out another execution before the end of that time.*" (Report of Revisors, p. 920).

We know of no authoritative decision on the subject. If there be such we shall esteem it a favor if some of our readers will bring it to our attention—or, preferably, will favor us with a discussion for publication.

THE *Canada Law Journal* calls attention to a recent English decision, *Consolidated Exploration Co.* v. *Musgrave* (1900), 1 Ch. 37, in which the court appears to have held that securities placed in the hands of bail in a criminal case, for his indemnity, by a third person, may be recovered, on the ground that a contract to indemnify bail in a criminal case is contrary to the policy of the law, and therefore invalid.

It seems to be well settled that there is no *implied* contract by the principal to indemnify his bail in a criminal case. As said by Mr. Justice Bradley in *United States* v. *Ryder*, 110 U. S. 729, to imply a contract of indemnity, and to subrogate the surety to the rights of the government, would render the surety less vigilant, and relieve him of the motives to exert himself in securing the appearance of the principal.

Whether the same principle applies to an *express* contract by the prisoner, or by a third person, to indemnify the bail in case he shall incur the penalty of the bond by the prisoner's default, is not so clear on authority. On principle, there can be no sound distinction made between an implied and an express contract in such case, or between cases where the promise of indemnity is made by the prisoner, and where made by a third person. The purpose of the bail bond is to secure the prisoner's presence in court at the time fixed in the bond. By denying the right of the bail to take indemnity, his vigilance is secured and quickened, and there is no inducement held out to him to relax his efforts to secure the prisoner's appearance. On principle, therefore, it cannot matter where the indemnity comes from, or how it arises—whether from an implied or an express promise, or from the prisoner or a third person.

In *Cripps* v. *Hartnoll*, 4 Best & S. (116 E. C. L.), 414, there was an

express parol promise by a father to indemnify the surety on a bail bond for his daughter, accused of crime, and the action by the bail against the father on this promise was sustained. But the question whether the contract was against public policy was not raised—the case going off on the question of the Statutes of Frauds. The court does, however, decide that there was no implied promise on the part of the *prisoner* to indemnify the bail, and hence that the promise of the father was original; but the illegality of such a promise, or a similar promise by a third person, is not once referred to.

In *Jones* v. *Orchard*, 16 C. B. (81 E. C. L.) 614, it is held that there may be a valid indemnity to bail for costs and expenses—with an intimation that this is as far as the law will permit the indemnity, whether on an express or implied contract.

In *Herman* v. *Jeuchner*, L. R. 15 Q. B. Div. 561, the bail bond was for the good behavior of the prisoner. He deposited funds with the bail to indemnify him against loss. In an action by the principal to recover the deposit, such a transaction was declared to be illegal, "because it takes away the protection which the law affords for securing the good behavior of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the court. . . . But if money to the amount for which the surety is bound be deposited with him, as indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed." This case is express authority for the proposition that a contract by the prisoner to indemnify the bail, is contrary to public policy, and invalid.

In *United States* v. *Simmons*, 47 Fed. 575 (14 L. R. A. 78), it is held that persons who have been indemnified by the accused, thereby disqualify themselves from being accepted as bail—on the ground that such a transaction is contrary to public policy. Whether the contract of indemnity in this case were enforceable or not, was not before the court for decision—but the court strongly condemns it; and though expressing the opinion that it was not enforceable, the court nevertheless held that the taking of the indemnity indicated a lack of confidence in the power or disposition of the bail to produce the prisoner at the proper time, and an unlawful effort to provide indemnity for themselves in that event.

There are two American cases which appear to be opposed to the doctrine that bail cannot recover indemnity of the principal—*Reynolds*

v. *Harral*, 2 Strob. (So. Car.) 87, and *Simpson* v. *Robert*, 35 Ga. 183. Both of these are cited in *U. S.* v. *Ryder* (*supra*). The first is critized by Mr. Justice Bradley as being based on a *nisi prius* English decision, long since overruled in England, and the second is, curiously enough, approved, as in accord with *Cripps* v. *Hartnoll* (*supra*). In the Georgia case thus approved by Mr. Justice Bradley, the facts were that the principal executed a mortgage to the bail, as indemnity, and the mortgage was sustained—the court saying that the duty of the principal "to indemnify his bail against the effects of the forfeiture has *never been doubted by anybody*, and no authority is offered" to the contrary.

Mr. Justice Bradley's opinion clearly indicates that he understood the law to be, that while there can be no *implied* contract of indemnity, there may be an *express* one—and he cites *Cripps* v. *Hartnoll* (*supra*) as authority for this proposition. But, as shown, the validity of the express contract was not raised in the latter case, except as it was affected by the Statute of Frauds—either in the Queen's Bench (2 Best & S., 110 E. C. L. 697), or on appeal in the Exchequer Chamber (4 Best & S., 116 E. C. L. 414). The Georgia case, therefore, confessedly decided without examination of the authorities, and on the belief expressed by the court that the right to indemnity "has never been doubted by anybody," can scarcely be regarded authoritative, outside of the local jurisdiction.

Harp v. *Osgood*, 2 Hill (N. Y.) 216, sometimes cited in this connection, is not in point.

From these authorities the conclusion seems to be justified that a contract to indemnify bail in a criminal case, is never implied by law, save as to costs and expenses properly incurred by the bail; and that an express contract to indemnify bail, whether made by the prisoner or by a third person, is invalid, as contrary to public policy.

SEVERAL questions of apparent difficulty, affecting rights of priority as between a conveyance and a judgment, arise under the provisions of chapter 109 of the Code, regulating the registry of deeds, and section 3570 touching the docketing of judgments. These questions may have been judicially settled, but not to our knowledge. We call attention to them in the hope that some of our subscribers may be induced to discuss them through the columns of the REGISTER.

Sec. 2465 of the Virginia Code declares (in substance) that every deed conveying real estate shall be void as to subsequent purchasers

for value without notice and creditors, "until and except from the time that it is duly admitted to record." By a subsequent section (2467, amended by Acts 1895–6, p. 285) it is declared that if the deed (not being a deed of trust or mortgage) be admitted to record within ten days from the date of its acknowledgment before a notary or other officer, such registry shall afford the same protection as if made on the day of such acknowledgment.

It is further provided by section 2470 that the word "creditors" in this connection shall embrace '*all creditors* who but for the deed would have a right to subject the property to their debts.'

Turning now to sec. 3570, regulating the docketing of judgments: This section provides that "no judgment shall be a lien on real estate as against a purchaser thereof for valuable consideration without notice, unless it be docketed according to the provisions of this chapter, ... either within twenty days next after the date of such judgment, *or fifteen days before the conveyance of said estate to such purchaser.*"

The following cases seem to present difficulty:

(1)

January 1, 1897: Conveyance A to B.
July 1, 1897: Judgment C *v.* A.
September 1, 1897: B's deed recorded.
October 1, 1897: C's judgment docketed.

Who has priority, B or *C?*

When B failed to record his conveyance within ten days, or at any time before C obtained his judgment, the conveyance was clearly void as to this judgment. But what is the effect of C's failure to docket his judgment, either within twenty days after its date or fifteen days before the conveyance to B (the latter impossible, in view of the fact that B's conveyance was prior in date)? Does the term "purchasers" in section 3570 refer to *subsequent* purchasers only? And purchasers who have recorded their conveyances according to the provisions of section 2465?

Again: (2)

January 1, 1897: Judgment C *v.* A.
July 1, 1897: Conveyance A to B.—without notice.
September 1, 1897: C's judgment docketed.
October 1, 1897: B's deed recorded.

Which now has priority?

By failure to docket his judgment within twenty days from its date,

or within fifteen days before the conveyance to B, this judgment would seem to be void as to B. But when B likewise failed to record his deed within ten days, or at any time before the docketing of the judgment, his deed would seem to be void, as to the judgment. In other words, there appears to be the paradoxical situation of each claim being void as to the other.

The question presents itself somewhat in this form: When it is declared that a conveyance is void as to *creditors* until recorded, is the real meaning that it shall be void as to creditors *who docket their judgments*, as provided by section 3570? Or, when it is declared by the latter section that an undocketed judgment shall be void as to *purchasers*, does the statute mean purchasers *who record their conveyances* within twenty days from date; or, who record at any time before the judgment is docketed? Or, is it meant that by failure to docket the judgment, the creditor loses his lien as against *all* subsequent (but not prior) purchasers?

Or, again, reading sections 2465 and 3570 together, where both the purchaser and the judgment creditor have failed to record or docket within the time prescribed, is the effect of the combined sections to give priority to him who is *afterwards* most diligent *in the matter of registry or docketing*?

(3)

A case of even more difficulty is presented in the following:

January 1, 1897: Judgment C *v.* A.
January 25, 1897: C's judgment docketed.
January 27, 1897: Deed of trust A to B.
January 28, 1897: B's deed of trust recorded.

Here, not having been docketed within twenty days after its date, nor within fifteen days before the execution of the deed of trust (supposed to have been taken without notice of the judgment) the judgment was, by express provision of sec. 3570, void as to the deed of trust, at the moment of the latter's execution. But by the provisions of secs. 2465 and 2467, the deed of trust is void as to *all* creditors (including, therefore, C) until recorded. Not having been recorded immediately, there was an interval between its date (January 27) and its recordation (January 28), during which time B, the deed of trust creditor, was in default. And when his deed of trust is (on January 28) placed on record, C's judgment is already on the lien docket. Is B to be postponed to C, or *vice versa?* If B in such case is to be postponed to C, because of the interval of twenty-four hours during

which he was in default, the same result would seem to follow, where the interval between the date of execution of the deed of trust and its recordation, was but the necessary few minutes required for transmission to the clerk's office. So it would follow, in this view of the case (where the judgment is docketed but not within the prescribed time), that although the judgment creditor is within the condemnation of sec. 3570, a subsequent deed of trust must always be postponed to such a judgment, because the former is, as to the judgment, without validity until actually admitted to record—in this respect differing from an ordinary conveyance, which has ten days of grace for purpose of registry.

And, on the other hand, if recordation of the deed of trust within twenty-four hours, *is* sufficient to give priority to B, the deed of trust creditor, would not the same priority result if he recorded within twenty-four days—or twenty-four months—or within any other imaginable time? If so, then need B record his deed of trust at all, so far as C is concerned? Has not C lost his priority absolutely, so soon as B takes his deed of trust without actual notice of the judgment, where the latter, not being docketed within the prescribed time, is void as to the deed of trust at the instant when the latter is executed? Does B in such case owe any duty of recordation to C? In this connection, see opinion by Burks, J., in *Davis* v. *Beazley*, 75 Va. 491, where it is held that a *subsequent* purchaser owes no duty of recordation to a *prior* purchaser.

Again, what is meant by the "date" of the judgment, in the provision of section 3570 that a judgment shall not be a lien as against a *bona fide* purchaser, unless it be docketed "within twenty days next after the *date* of such judgment?" Is it, by relation, the first day of the term, according to the ordinary rule, or is it the actual date on which the judgment is entered? If the former, the judgment creditor might lose the benefit of his lien by a sale of the property during the term, where the judgment is entered after the twentieth day of the term. It follows, under this view, that if the judgment were entered on the twenty-first day of the term, and were at once docketed, the judgment creditor would be liable to be postponed to any *bona fide* purchaser who bought either during the term, or within the next fifteen days thereafter. Does not the statute use the word "date" as meaning the actual date on which the judgment is entered?

We do not mean to express an opinion on the questions suggested. Indeed we are but in the doubting stage, and have reached no satisfactory conclusion.

Will some one who has made, or is willing to make, a study of these questions, give us, and through us our readers, the benefit of his investigations?

SUPREME COURT OF APPEALS OF VIRGINIA.